United Nations CCPR/C/SR.3521

International Covenant on Civil and Political Rights

Distr.: General
31 July 2018

Original: English

Human Rights Committee
123rd session

Summary record of the 3521st meeting
Held at the Palais Wilson, Geneva, on Tuesday, 24 July 2018, at 10 a.m.
Chair: Ms. Waterval (Vice-Chair)

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Ms. Waterval (Vice-Chair) took the Chair.

The meeting was called to order at 10 a.m.

Organizational and other matters, including the adoption of the report of the Working Group on Communications (*continued*)

Draft general comment No. 36 on article 6 of the Covenant (Right to life) (*continued*) (CCPR/C/GC/R.36/Rev.7)

1. **The Chair** invited the Committee to resume the second reading of its draft general comment No. 36 on article 6 of the International Covenant on Civil and Political Rights (Right to life), beginning with paragraph 31.

Paragraph 31

2. **Mr. Shany** (Rapporteur for the general comment) said that a revised version of paragraph 31 had been circulated in the light of the discussions that had taken place earlier in the session. The following language had been added to the first sentence: "know or should have known of potentially unlawful deprivations of life", "such incidents", "where appropriate", "other States and international organizations" and "excessive use of force with lethal consequences". It had later been pointed out that a territorial limit should apply to "other States and international organizations or private individuals or entities". He therefore proposed that the phrase "operating in their territory or subject to their jurisdiction" should be inserted after the word "entities" in the revised text.

3. The following language had been added to the third and fifth sentences, respectively: "should be undertaken in accordance with relevant international standards, including the Minnesota Protocol on the Investigation of Potentially Unlawful Death" and "normally required". A proposal had since been made to insert new language after the first sentence in the revised text to read: "The duty to investigate also arises in circumstances in which a serious risk of deprivation of life was caused by the use of potentially lethal force, even if the risk did not materialize." The insertion of a reference to paragraph 7 of the draft general comment had also been proposed.

4. **Mr. Ben Achour** said that, while the obligation of States parties to investigate and prosecute unlawful deprivations of life committed by State authorities or private individuals or entities was straightforward, the obligation to investigate and prosecute such acts when committed by other States was less clear-cut. Indeed, there were arguably several approaches that States parties could take to such a situation, including the submission of a communication under article 41 (a) of the Covenant. The inclusion of a reference to "other States" could open the door to several interpretations, some of which might prove prejudicial.

5. **Mr. de Frouville** said that it was his impression that, the more the Committee added to the paragraph, the greater the risk that it might be subject to tendentious or inaccurate interpretations. The text could be simplified by deleting the reference to the potential perpetrators of unlawful deprivation of life altogether. He also questioned the usefulness of inserting the phrase "operating in their territory or subject to their jurisdiction" on the grounds that the territorial jurisdiction of States and the obligation to investigate that flowed from it were already well known. Moreover, it was important to not exclude situations in which States might be obliged to investigate acts that had allegedly taken place in other territories, as in the case, for example, of international crimes.

6. **Ms. Brands Kehris** said that, while she approved of the new language to be inserted after the first sentence in the revised text, she noted that paragraph 7 of the draft general comment referred to threats to life, not to risks of deprivation of life. Given that threats and risks could be somewhat different in that context, it might be more logical to include both terms to prevent any misunderstanding.

7. **Ms. Cleveland** said that, if the reference to the potential perpetrators of unlawful deprivation of life were retained, the first sentence should be split into two separate sentences for the sake of readability.

8. **Mr. Shany** said that there was indeed a risk that the inclusion of a reference to "other States and international organizations" could raise complicated questions about States parties' obligations in that regard and that the simplest solution would be to delete the reference to the potential perpetrators of unlawful deprivation of life altogether, as suggested by Mr. de Frouville. The first sentence would then read: "An important element of the protection afforded to the right to life by the Covenant is the obligation on the States parties, where they know or should have known of potentially unlawful deprivations of life, to investigate and, where appropriate, prosecute such incidents, including allegations of excessive use of force with lethal consequences." The proposed new language "operating in their territory or subject to their jurisdiction" would likewise be omitted from the revised text. The phrase "serious risk", rather than "serious threat", had been used in the new sentence because the duty to investigate serious risks of deprivation of life was a more narrowly defined obligation than the more general duty to address threats to life. The duty to investigate such risks was usually triggered by situations where the right to life had been or had almost been violated. The positive obligations of States were naturally much broader and covered responses to many threats that did not rise to the threshold of "serious risk".

9. **The Chair** said she took it that the Committee wished to adopt paragraph 31 as amended, pending the circulation of the updated revised text.

10. *Paragraph 31 was adopted on that understanding.*

Paragraph 32

11. **Mr. Shany** said that the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Australia had expressed concern over the use of the phrase "full reparation" in the first sentence and had asked the Committee to reconsider its choice. The phrase was the standard language used by the Committee and, in his opinion, should not be changed. The Government of the United Kingdom had also requested clarification on the circumstances in which alleged violations of the right to life might be investigated ex officio, given that States could not investigate incidents that had not been brought to their attention. The penultimate sentence of the paragraph could be reformulated with that concern in mind.

12. The Government of France had emphasized that the conduct of autopsies as part of an investigation was only relevant in situations that did not involve armed conflict. That concern had already been addressed by the addition of the qualifying language "Where relevant" at the beginning of the third sentence. The Government of Japan had voiced concerns about the impact that publicizing the findings, conclusions and recommendations arising from an investigation could have on the privacy and honour of a victim and his or her family. That concern had already been addressed by the insertion of the qualifying language "unless absolutely prevented from doing so due to a compelling need to protect the public interest or the legal rights of directly affected individuals" in the fifth sentence. The Government of the Netherlands had questioned the use of the word "rigorous" in the third sentence on the grounds that, in the context of that paragraph, an autopsy was a means to an end and not an end in itself. He concurred that the degree of thoroughness of an autopsy would be dictated by the requirements of the investigation, and he therefore proposed that the word "rigorous" should be deleted.

13. The Government of Japan had proposed that the phrase "whenever possible" in the third sentence should be replaced with "whenever appropriate", as it might not always be appropriate for an autopsy to be conducted in the presence of a pathologist representing a victim's family. That proposal should not be accepted, in his view, as to do so might reduce the role of the family in the investigation. The Government of Poland had similarly objected to the idea of a pathologist representing a victim's family being present during the autopsy and had proposed that the term "independent expert" should be used instead. That proposal would, in his view, add little value to the text. The Government of Switzerland had expressed a similar concern and had asked the Committee to justify its decision to make a specific reference to a pathologist in the text. A reference to paragraph 16 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions should be included in order to address that request.

14. The Government of the Russian Federation had stated that the course of investigations should be determined by domestic law and that States were under no obligation to cooperate with international mechanisms of investigation. While that statement was accurate, it should be recalled that domestic laws governing the course taken by investigations must conform to the standards set out in the Covenant. Moreover, the language of the final sentence of the paragraph characterized cooperation with international mechanisms of investigation as a best practice and in no way implied that States were under a legal obligation to do so.

15. A group of non-governmental organizations (NGOs), including the American Civil Liberties Union, had urged the Committee to use stronger language on the disclosure of information on investigations, the course of investigations and the legal basis of acts of deprivation of life. Additional language could be proposed to reflect that concern. A humanitarian organization, which wished to remain nameless, had proposed that a cross reference to paragraph 67 of the draft general comment, which dealt with armed conflict, should be included in paragraph 32 and had pointed out that, under international humanitarian law, there was no duty to reveal the reasons for targeting certain individuals. The request for the inclusion of a cross reference could be accommodated, and the wording of the relevant part of the fourth sentence could perhaps be modified, although it should be borne in mind that the Covenant introduced obligations that took precedence over international humanitarian law in that regard. Amnesty International had underscored the need for family members to be allowed to submit evidence in the course of investigations and had asked the Committee to address due process standards. While the first issue could be dealt with succinctly in the existing text, there was no scope for addressing due process standards in a paragraph that was already lengthy and complex. Lastly, Al-Haq had asked the Committee to take up the delicate issue of the withholding of bodies. However, that issue was not directly related to investigations into the unlawful deprivation of life, and he did not believe that it should be mentioned in the paragraph.

16. He therefore proposed that a cross reference to paragraph 67 should be inserted after the reference to article 6 in the first sentence and that, in the third sentence, the word "rigorous" should be deleted and a footnote referencing paragraph 16 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions should be inserted. He further proposed that the fourth sentence should be reformulated to read: "... including the reasons and legal basis for targeting certain individuals ...". The fifth sentence should likewise be reworded to read: "States parties should also disclose relevant details about the investigation to the victim's next of kin, allow them to present new evidence and make information public about the investigative steps taken and the investigation's findings, conclusions and recommendations ...". Lastly, he proposed that the second part of the penultimate sentence should be redrafted to read: "... including when brought to the attention of the State in the absence of a formal complaint".

17. **Mr. Fathalla** proposed that the word "discreet" should be added to the list of adjectives in the first sentence so as to allay the various concerns that had been raised about privacy. While there was no legal basis for obliging a State to cooperate with international mechanisms of investigation, States should, at the very least, officially recognize the existence of such mechanisms, including by ratifying applicable treaties.

18. **Mr. Heyns** said that an alternative to deleting the word "rigorous" in the third sentence might be to reword that portion of the text to read: "an autopsy conducted to accepted professional standards". As to the concerns raised about the feasibility of having a pathologist representing a victim's family present during an autopsy, he recalled that, while paragraph 37 of the Minnesota Protocol provided that family members should be entitled to have a representative present during the procedure, it did not stipulate that the representative had to be a pathologist, whose services relatively few families would be able to afford. He proposed amending the language of the third sentence to read: "... in the presence of a representative of the victim's family." He was likewise concerned that the revised wording of the penultimate sentence failed to account for the possession of constructive knowledge. To his mind, the phrasal verb "looking into" in the final sentence was not of a sufficiently high register and should be replaced.

19. **Mr. Santos Pais** said that he also found the revised wording of the penultimate sentence to be problematic insofar as States had a duty to be aware of any violations of article 6 of the Covenant that took place in their territory even if such a violation had not been brought to their attention. The inclusion of such language could arguably give States licence to ignore unreported violations of article 6. He was not in favour of inserting the word "discreet" into the first sentence, as criminal investigations, which were conducted in secrecy, were, by their very nature, discreet. The insertion of the word could even give the erroneous impression that the Committee wished for investigations to be shielded from public scrutiny.

20. **Ms. Kran** said that the concerns raised by Mr. Heyns and Mr. Santos Pais in relation to the revised wording of the penultimate sentence could perhaps be addressed by reproducing some of the language used in paragraph 31 to allude to the possession of constructive knowledge, such as "where they [States parties] know or should have known of potentially unlawful deprivations of life". Instead of adding the word "discreet" to the list of adjectives in the first sentence, the Committee would do better to openly express its desire for investigations to be respectful of the privacy of victims and their families. Indeed, placing the word "discreet" next to the word "transparent" could be perceived as being a contradiction in terms.

21. **Mr. Politi** said that, in the penultimate sentence, language should be included to indicate that investigations into alleged violations of the right to life should commence when appropriate, "upon knowledge of the relevant information by the judicial authorities and even in the absence of a formal complaint".

22. **Ms. Brands Kehris** said that she supported the proposals made by Mr. Shany, Mr. Heyns and Mr. Politi. Moreover, the fifth sentence should include a reference to disclosing information about the methodology used and the measures taken by the State party, in addition to its findings, conclusions and recommendations.

23. **Mr. Shany** said that, rather than including the word "discreet" in the first sentence and thereby possibly introducing an element of confusion, he would propose reformulating the fifth sentence to refer to a State party's duty to make information public unless it was absolutely prevented from doing so due to a compelling need to protect the public interest or the privacy and other legal rights of directly affected individuals. With regard to the issue of the participation of family members, Mr. Fathalla had made a very good point. That issue was dealt with in three different places in the paragraph by the references to the right of the family to have a representative present during the autopsy, the State party's duty to disclose certain information to the victim's next of kin and the proposed insertion of language referring to the next of kin being allowed to present new evidence. In order to address the point raised by Mr. Fathalla regarding the last sentence, perhaps the Committee could add the word "support" to indicate the fact that the sentence also related to third parties.

24. With respect to the concerns expressed about a reference to "rigorous" or "professional" standards in the sentence regarding autopsies, in his view it would be preferable to dispense with any mention of standards altogether. Reference could, of course, be made to the Minnesota Protocol. He also agreed with the proposal to replace the word "pathologist" with "representative", which would address the concerns raised by a number of States parties.

25. In line with Mr. Heyns's proposal, it seemed best to delete the word "alleged" from the penultimate sentence. As to the issue of the reference to "ex officio", his inclination was to retain the original wording and to avoid elaborating further on that point. He had initially proposed inserting the word "including", but its use would raise the question as to what was not being included, which was problematic. Thus, the sentence could end after the words "ex officio". In any event, the question as to what factors triggered an obligation had already been covered in paragraph 31. In that same sentence, the words "when necessary" could be replaced with "when appropriate", as proposed by Mr. Politi, since "appropriate" was a more demanding standard than "necessary". As for the question of whether there was a presumption of a duty to disclose information, it seemed clear that the use of the words "unless absolutely prevented" signaled the existence of such a presumption. The words

"support and" could be added before "cooperate" in the last sentence and "looking into" could be replaced with "addressing", which denoted a more active response.

26. **Mr. Heyns**, supported by **Mr. Fathalla** and **Mr. Muhumuza**, said that, in order to harmonize the text with article 35 of the Minnesota Protocol, language could be included before the fifth sentence which indicated that the family members of victims should be granted legal standing during investigations.

27. **Mr. Shany** said that, for the sake of clarification, he would read out the fifth sentence with the proposed changes: "States parties should also disclose relevant details about the investigation to the victim's next of kin, allow them to present new evidence and make public information about the investigative steps taken and the investigation's findings, conclusions and recommendations, unless absolutely prevented from doing so due to a compelling need to protect the public interest or the privacy and other legal rights of directly affected individuals."

28. **Ms. Brands Kehris**, supported by **Ms. Cleveland**, said that she would propose referring to the need for States parties to make public their findings, conclusions and recommendations "subject only to redactions that were absolutely necessary". Such language would be intended to counter the tendency of States parties to issue a blanket refusal to provide any information at all on a given investigation based on the argument that certain aspects could not be made public owing to, for example, national security concerns.

29. **Mr. Shany** said that, in order to address the two concerns that had recently been raised, he proposed to add the words "afford them with legal standing" after the words "allow them to present new evidence" in the fifth sentence. In that same sentence, the words "unless absolutely prevented" could be replaced with "subject to absolutely necessary redactions justified by a compelling need …".

30. *Paragraph 32, as amended, was adopted.*

Paragraph 33

31. **Mr. Shany** said that the paragraph established that there were certain circumstances in which there was a presumption of State responsibility for the arbitrary deprivation of life and that States needed to rebut that presumption by undertaking a robust investigation; in general, the submissions received from Governments had advocated lowering the standard for the presumption of responsibility. The Government of Australia was concerned that the idea of presumption in the paragraph did not reflect the current state of international law, while the Governments of the Netherlands and the United Kingdom had, respectively, proposed amending or deleting the first sentence. The Government of Japan had expressed concerns about the concepts of "an unnatural death" and "reliable reports", while the Government of Canada had proposed using narrower language with regard to the presumption of responsibility by replacing the words "create a presumption of arbitrary deprivation of life" with the words "create serious concerns that there has been an arbitrary deprivation of life".

32. The Government of the Russian Federation had proposed adding the word "peaceful" before "demonstrators" in the reference to using live fire against demonstrators. He did not believe, however, that that proposal should be taken up, since any use of live fire against demonstrators raised serious concerns about respect for the right to life. Both the Government of Australia and the American Civil Liberties Union (ACLU) had expressed concerns about the concept of "heightened duty". ACLU had also advocated rewording the second sentence so that it would not be misconstrued as implying that there was a lesser obligation on the part of States parties to investigate civilian deaths within the theatre of military operations.

33. In view of those submissions, he proposed reformulating the first sentence to read: "Loss of life occurring in custody in unnatural circumstances creates a presumption of arbitrary deprivation of life by State authorities." In the second sentence, he proposed deleting the words "by firearms outside the theatre of military operations" after the words "found dead" in the final sentence.

34. **Mr. Heyns**, supported by **Ms. Brands Kehris**, said that he would prefer not to refer to the concept of a "heightened duty" to investigate violations of article 6 and proposed that the words "particular duty" should be used instead. In addition, the words "or other potentially lethal force" could be inserted after the words "used firearms" in the second sentence.

35. *Paragraph 33, as amended, was adopted.*

Paragraph 34

36. **Mr. Shany** said that paragraph 34 largely reflected existing standards and the Committee's substantial case law on non-refoulement. The Government of the Russian Federation had stated that there was no non-refoulement obligation under the Covenant, a position not shared by the Committee.

37. The Government of Canada had proposed new language that would emphasize the issues of foreseeable risk, personal risk and reliable assurances. Such a reformulation of the text would be inadvisable as it would also require the reformulation of the Committee's general comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant. He was also reluctant to accept the Canadian Government's proposal to adopt a principle of fair assessment of the assurances by the sending State, as it would lower the assessment standard already in place. However, its proposals regarding the clarification of the references to the obligations of sending and receiving States could be used to improve the text.

38. The proposal made by the Government of Japan to add the words "unless credible and effective assurances against the imposition of the death penalty in violation of article 6 of the Covenant have been obtained" at the end of the third sentence would run counter to the Committee's established case law. A similar proposal had been made by the Government of Switzerland. Amnesty International had proposed that assurances should be referred to only in the context of death penalty cases for a number of reasons, but that would not reflect the Committee's practices either. Mr. Martin Scheinin had raised the valid point that assurances should constitute only one of the elements to be taken into consideration by the removing State.

39. There had also been some proposals to include a reference to verifiable assurances, but the present mention of effective assurances would seem to be sufficient. In addition, the final sentence of the paragraph conveyed the idea of verifiability. The Government of the Netherlands had expressed its concern about the open-ended reference in the final sentence to monitoring the receiving State's compliance with assurances. However, the existing reference to putting in place "adequate mechanisms" had a temporal dimension and implied that the sending State would not be required to monitor the receiving State's compliance for an unreasonable length of time.

40. The Governments of Switzerland and the United Kingdom had raised objections to the inclusion of some of the communications mentioned in the paragraph on the grounds that they were not valid non-refoulement cases. The Governments of Japan and Canada had proposed deleting the reference to the case of *Warsame v. Canada*, which dealt with the concept of a dangerous country, but, while that case had been contested, it reflected an established practice and should, in his view, be mentioned.

41. The Government of Switzerland had encouraged the Committee to make specific reference to the conditions under which a removed individual would be held when considering the risk to life that might emanate from the authorities of a receiving State. In response to its proposal, the fifth sentence could be reformulated to refer to the need to assess "the situation of the removed individual and the conditions in the receiving State". There had been a proposal to refer to the case law of the European Court of Human Rights to provide for cases in which the general conditions in a receiving State might be the only reason for non-refoulement. The Committee generally took the position that general conditions could not constitute the sole reason for a decision not to return an individual to another State, but there might be cases in which that was not so. The phrase "except in the most extreme cases" could therefore be added to the end of the second sentence, which reflected the idea of group protection present in international refugee case law.

42. **Ms. Pazartzis** said that a footnote referring to general comment No. 31 could be added to support the first few sentences of the paragraph. In her view, the proposed amendment to the second sentence would not add anything to the text.

43. **Mr. Heyns** said that, on the contrary, the amendment to the second sentence would clarify an issue that arose frequently in the context of individual communications. He proposed including a reference to the relevant decision of the European Court of Human Rights in a footnote.

44. **Mr. Shany** said that the amendment to the second sentence would make it clear that, in exceptional cases where the general population of the receiving State was at risk of death, there was no need to prove the existence of a personal risk.

45. **Ms. Cleveland**, supported by **Ms. Brands Kehris**, said that the Committee might wish to consider addressing more complex cases of refoulement, such as the transfer of persons to a third country that might subsequently transfer them to a country where they were at risk of being deprived of their life. She proposed, for example, referring not only to countries but also to situations in which there were substantial grounds for believing that individuals might be deprived of their life in violation of article 6 of the Covenant.

46. **Mr. Fathalla** said that, with reference to the penultimate sentence, he could not see how the receiving State could be expected to provide assurances if its territory was effectively under the control of non-State actors or foreign States.

47. **Mr. Shany** said that, in such cases, the receiving State might be able to provide assurances that the individual would be under police protection or would remain in areas where the non-State actors or foreign States in question were not operating.

48. **Mr. Muhumuza** said that, since States were generally unwilling to admit that non-State actors or foreign States had seized control over their territory, in such cases it would be up to the removing State to determine whether there was any point in seeking assurances from the receiving State.

49. **Ms. Brands Kehris** proposed referring to violations of the right to life under article 6 of the Covenant rather than to deprivation of life in violation of article 6, since the paragraph concerned not only immediate deprivation of life upon arrival in the receiving State but also extreme circumstances in the receiving State that posed a risk to life.

50. **Mr. Santos Pais** said that he would appreciate clarification of the phrase "internal flight options".

51. **Mr. Shany** said that "internal flight options" referred to the ability of a removed person to seek refuge in a safe area of the receiving State. He was in favour of retaining the proposed amendment to the second sentence and referring to the European Court of Human Rights judgment in the case of *N.A. v. United Kingdom* in a footnote. He also agreed with the proposal made by Ms. Brands Kehris regarding the use of the words "the right to life". He was reluctant to enter into a lengthy discussion of more complex cases of refoulement, however, especially as the existing wording did not exclude such cases. He felt that referring to situations as well as countries, as proposed by Ms. Cleveland, would simply create confusion, for the word "situation" was too vague.

52. **Ms. Cleveland** said that there was no need to make further amendments, provided that there was an understanding that the paragraph did not constitute a preclusive discussion of the circumstances in which the Committee might address the issue of non-refoulement.

53. *Paragraph 34, as amended, was adopted with minor drafting changes.*

Paragraph 35

54. **Mr. Shany** said that paragraph 35 asserted that non-refoulement obligations under article 6 of the Covenant were broader than those existing under international refugee law. The Government of Japan had noted that non-refoulement obligations under article 6 were not broader in all respects, since international refugee law covered cases that did not involve deprivation of life. The Government of the United States of America had refused to accept the idea that the Covenant established an obligation of non-refoulement. The

Government of the Netherlands had argued that access to asylum procedures did not fall within the scope of article 6; it should be noted, however, that the paragraph referred specifically to status determination procedures that could offer protection against refoulement. Amnesty International had proposed mentioning the rights of asylum seekers whose application for asylum had been rejected, while another humanitarian organization had proposed addressing the rights of refugees. Lastly, the Children Education Society had pointed out that groups, as well as individuals, could be granted a specific status. Based on those comments, he proposed replacing "is broader" with "may be broader" and replacing "individualized status determination procedures" with "individualized or group status determination procedures".

55. *Paragraph 35, as amended, was adopted.*

The meeting was suspended at 11.45 a.m. and resumed at noon.

Paragraph 36

56. **Mr. Shany** said that paragraph 36 introduced a discussion on the imposition of the death penalty. He was not in favour of to incorporating the stylistic changes proposed by Martin Scheinin or to refer to the abolitionist goal, as requested by Al-Haq.

57. *Paragraph 36 was adopted.*

Paragraph 37

58. **Mr. Shany** said that paragraph 37 described the limits on the application of the death penalty that were set forth in article 6 (2) of the Covenant. The Government of Japan had proposed reformulating the second sentence, but he would prefer to retain the existing wording, which conveyed the great tension that existed between the right to life and the regulation of the death penalty. The Government of the Russian Federation had criticized the Committee for implying that the death penalty was prohibited under international law; he would argue, however, that the draft general comment made it clear that the application of the death penalty was not prohibited under international law, but rather strictly regulated. With regard to the language in square brackets, the Government of the United States had argued in favour of saying that article 6 (2) should be, rather than had to be, narrowly construed, on the grounds that the Committee could not impose new obligations on States parties; in his view, the second option was preferable, for the sentence was intended to give expression to an existing obligation rather than a recommendation.

59. **Mr. Heyns**, agreeing with Mr. Shany, recalled that article 6 of the Covenant had been drafted in such a way as to allow for the death penalty but to pave the way for its eventual abolition.

60. **The Chair** said she took it that the Committee wished to use the wording "the contents of paragraph 2 have to be narrowly construed".

61. *Paragraph 37, as amended, was adopted.*

Paragraph 38

62. **Mr. Shany** said that paragraph 38 dealt with the irreversibility of the abolition of the death penalty. The Government of Japan had proposed distinguishing between States parties to the Covenant and States parties to the Second Optional Protocol in the first sentence. The Government of Poland had voiced its opposition to the notion of irrevocable abolition, while the Government of Switzerland had proposed elaborating on the issue of assurances in the final sentence. The Government of the Netherlands had proposed specifying that States parties could not withdraw from the Second Optional Protocol unilaterally; the Government of the Russian Federation, on the other hand, had refused to accept the proposition that States parties could not denounce the Second Optional Protocol.

63. The Government of the United States had raised a number of points; in particular, it had challenged the ban on the partial reintroduction of the death penalty, which was based on the Committee's pro-abolitionist interpretation of article 6 (2) of the Covenant. A humanitarian organization had proposed referring not only to deportation and extradition,

but also to the transfer of individuals. Mr. Marc Bossuyt had proposed using more inclusive language in the first sentence by referring to States that had become parties to the Second Optional Protocol, rather than States that had acceded thereto. Lastly, Mr. Scheinin had made a specific language proposal which was, however, not consistent with the wording used elsewhere in the draft.

64. Based on those comments, he proposed replacing "States parties" with "States parties to the Covenant" and replacing "acceding to" with "becoming parties to" in the first sentence; replacing "cannot denounce it" with "cannot unilaterally denounce it" in the second sentence; and amending all references to deportation and extradition to include other forms of transfer.

65. **Mr. de Frouville**, drawing attention to the Committee's general comment No. 26 on issues relating to the continuity of obligations, said that he did not support the proposal to insert the word "unilaterally" because, as he understood it, States parties to the Covenant or to the Second Optional Protocol could not denounce those instruments, unilaterally or otherwise.

66. **Mr. Politi** said that the Second Optional Protocol was subject to article 56 of the Vienna Convention on the Law of Treaties, which established the conditions governing the right of denunciation. In his view, the existing wording was sufficient and could be interpreted in the light of that Convention.

67. **The Chair** said she took it that the Committee wished to adopt paragraph 38, subject to the amendments proposed by Mr. Shany, with the exception of the one relating to unilateral denunciation.

68. *Paragraph 38, as amended, was adopted.*

Paragraph 39

69. **Mr. Shany** said that paragraph 39 tackled the issue of "the most serious crimes", for which the imposition of the death penalty was considered acceptable, and listed other crimes which could never justify the imposition of capital punishment. The Committee's guidance was sought on whether or not political crimes should be included in the list of crimes that must not carry the death penalty. The Government of Egypt had submitted that the issues addressed in the paragraph did not fall within the scope of the Covenant. The Government of the Russian Federation had voiced the view that the definition of the severity of a crime was the exclusive prerogative of the State. Those positions were contrary to the Committee's approach and to the very nature of the Covenant, which was intended to serve as an instrument for regulating the way in which States upheld the rights set forth therein, including the right to life. The Government of Japan had requested that armed robbery, piracy and sexual offences should be removed from the list, as they could result in death. The Committee might wish to discuss whether the notion of "crimes" at the beginning of the second sentence should be expanded by referring to "criminal law provisions enumerating crimes not resulting directly and intentionally in death" to accommodate the concern expressed by the Government of Japan. It might be, however, that the simplicity of the current wording rendered the message more effective.

70. The Advocates for Human Rights had requested the Committee to address the issue of involvement in a collateral, non-lethal crime. Supported by **Ms. Cleveland**, he said that, although the proposal was certainly valid, the notion of "collateral involvement" was subject to interpretation, and a reference might not be useful in the context of the paragraph under consideration. Reprieve had proposed the addition of a reference to the need to resentence persons who had been given the death penalty for crimes which did not qualify as one of the most serious crimes.

71. In the light of the foregoing, he proposed retaining the reference to political crimes and adding a sentence at the end that could read: "They should also revoke death sentences for crimes not qualifying as the most serious crimes and pursue the necessary legal procedures to resentence those convicted of such crimes."

72. **Mr. Santos Pais** said that it might be useful to rearrange the list of crimes in the second sentence in order to establish a logical order. Accordingly, there could be three

groups of crimes: corruption and economic and political crimes; armed robbery, piracy and abduction; and drug offences and sexual offences.

73. **Mr. Heyns**, supported by **Ms. Cleveland**, said that the second sentence, as drafted, was sufficiently clear. The qualification as "crimes not resulting directly and intentionally in death" was applicable to all the crimes that were listed, and the sentence should therefore be retained without amendment, except for the inclusion of the reference to political crimes. The notion whereby article 6 applied not only to executions as such but also to the imposition of the death penalty was usefully reflected, although it might have been better placed in paragraph 37. He was not entirely convinced that the final sentence was necessary, especially since it could be interpreted as suggesting that a progressive review of legislation should be conducted, which might not be altogether desirable.

74. **Ms. Brands Kehris** said that the deletion of the word "constantly" in the last sentence might address that concern.

75. **The Chair** said she took it that the Committee wished to adopt the paragraph while retaining the reference to political crimes and deleting the word "constantly" in the last sentence.

76. *Paragraph 39, as amended, was adopted.*

Paragraph 40

77. **Mr. Shany** said that the paragraph further elaborated on paragraph 39 by expressly prohibiting the imposition of the death penalty for conduct whose very criminalization constituted a violation of the Covenant. The Government of the Russian Federation had argued that it was for States, not the Committee, to determine the degree of public danger posed by illegal actions, criminalize them and establish measures of responsibility. Several civil society organizations had requested the inclusion of references to additional types of conduct, but he was disinclined to heed that request. The examples were drawn from the Committee's experience and the list was not exclusive; there was no need to add examples that were mere variations of those already mentioned.

78. Supported by **Mr. Heyns**, he proposed retaining the current wording, including the reference to the establishment of political opposition groups that appeared in square brackets.

79. *Paragraph 40 was adopted.*

Paragraph 41

80. *Paragraph 41 was adopted.*

Paragraph 42

81. **Mr. Shany** said that the paragraph addressed the interplay between the Convention on the Prevention and Punishment of the Crime of Genocide and article 6 of the Covenant. It had not prompted any controversy, with the exception of a request to replace the word "punish" with "condemn". He was unprepared to take that request on board, however, since the term was taken from the Convention.

82. **Ms. Pazartzis** asked whether the paragraph would be moved to the final part of the document, as suggested during the Committee's first reading of the draft.

83. **Mr. Shany** proposed that, once the individual paragraphs had been adopted, the Committee might wish to review the document as a whole and decide on the final order.

84. *Paragraph 42 was adopted on that understanding.*

Paragraph 43

85. **Mr. Shany** said that the paragraph addressed issues relating to retroactivity. The Government of Japan had requested the deletion of the second part of the paragraph, starting with "On the other hand", arguing that the application of the retroactive leniency (*lex mitior*) principle would be unfair to those who had already been executed for the same

offence. The Committee took a different view in that regard, and the Japanese Bar Association, for its part, had criticized the Government's position. Mr. Scheinin had proposed the inclusion of a sentence that excluded mandatory capital punishment for terrorist crimes. However, it had already been stated in paragraph 41 that mandatory death sentences were arbitrary in nature, so it might be unwise to single out terrorist crimes.

86. *Paragraph 43 was adopted.*

Paragraph 44

87. **Mr. Shany** said that paragraph 44 dealt with the relationship between methods of execution and the implementation of article 7 of the Covenant. The Government of France had wished to add a reference to health status as a factor of vulnerability in the last sentence. The Governments of Japan and the Russian Federation had taken exception to the word "yet" and its implications in the phrase "States parties that have not yet abolished the death penalty". The Government of Japan had also objected to the implication that a failure to respect any element whatsoever of article 7 would inevitably render the execution arbitrary in nature and had proposed replacing the word "would" in the second sentence with "could" and deleting the word "inevitably". However, not only would the use of the word "could" nullify the notion of inevitability, it would also dilute the intent of the sentence. The Government of Japan had further taken issue with the statement that a failure to provide individuals on death row with timely notification of the date of their execution constituted a form of ill-treatment. However, he wished to note that the adverbial phrase "as a rule" implied acknowledgement of the fact that, depending on the circumstance, notification could be prejudicial to the individual. The Committee took the view that individuals were entitled to make an informed choice about whether or not they wished to be notified of matters relating to their fate. Lastly, the Government of Japan had expressed the opinion that solitary confinement did not always constitute a violation of article 7 and had requested the deletion of the reference to it. He should point out, however, that the phrase "may also entail" qualified the presumption of a violation and thus left room for interpretation.

88. The Government of the Russian Federation had stated that the imposition of the death penalty and the selection of methods of execution were regulated by the State. It had also asserted that issues relating to the observance of the rights of persons sentenced to exceptional punishment were not directly linked with article 6 of the Covenant and would more properly be considered in the context of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, it was the Committee's long-standing position that the matter fell squarely within its competence. The Government of the United States had objected to the views expressed regarding certain methods of execution and the impact of solitary confinement or delays in carrying out a death sentence. It had also suggested that those issues did not fall within the scope of the general comment under consideration, but he struggled to accept the proposition that the subject of methods of execution was not pertinent in a general comment that dealt, among other matters, with the death penalty. There had also been a proposal to include a reference to the secrecy around the lethal "cocktail" used in executions, but such a reference, while valid, would be excessively specific.

89. **Mr. de Frouville**, referring to the words in the last sentence placed in square brackets, said that "especially" should be retained and "exceptionally" deleted in the phrase "[especially] when the long time on death row exposes sentenced persons to [exceptionally] harsh or stressful conditions". The fourth sentence should be removed, since methods of execution should not be categorized according to differing degrees of painfulness and humiliation; they were painful and humiliating by nature. The scope of article 7 was very broad, and it was for the Committee to interpret the provision and rule on its applicability on a case-by-case basis. Entering into the details of applicability with regard to methods of execution was unnecessary and potentially perilous.

90. **Mr. Santos Pais**, supported by **Mr. Heyns** and **Mr. Shany**, said that the sentence concerning other methods of execution should be retained. It might also be useful to add a reference to the importance of notifying the family of a person on death row of the scheduled date of execution.

91. **Mr. Heyns** said that he agreed that the death penalty itself was problematic and that there was no "clean" way of killing someone. Nonetheless, providing examples of methods of execution that were contrary to article 7 did not preclude the possibility that the Committee could decide on the applicability of that statement on a case-by-case basis.

92. **Mr. Shany** said that he would support the inclusion of a reference to the notification of relatives. He concurred with Mr. Heyns's remarks and felt that the inclusion of a non-exclusive list of specific methods of execution that States parties were expected to forswear had merit. In the light of the discussion and the comments submitted by States parties, and provided that the members of the Committee agreed, he wished to propose deleting the word "yet" in the first sentence, adding "health" in the last sentence, retaining the word "especially" and omitting the word "exceptionally".

93. *Paragraph 44, as amended, was adopted.*

The meeting rose at 1 p.m.